

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

ADA S. MCKINLEY COMMUNITY SERVICES, INC.

Employer

and

Case 13-RC-21225

SERVICE EMPLOYEES INTERNATIONAL UNION

(SEIU), LOCAL 73

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.¹

I. Issues

Service Employees International Union (SEIU), Local 73 (herein the “Petitioner”) seeks an election in the following unit: all full-time and regular part-time Head Start and Child Care employee classifications, including teacher, teacher assistant, teacher aide, teacher floater, cook, food aide, social service worker, social service aide, clerk/typist, group worker, and maintenance/custodian at its six Chicago, Illinois facilities; excluding directors, site directors, managers, confidential employees, secretary/office clerical employees, guards, and professional employees and supervisors as defined in the Act.

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Employer asserts that the petitioned-for unit is inappropriate for purposes of collective-bargaining for three reasons: (1) the proposed multifacility unit is inappropriate and that only a single site unit would be appropriate under the Act; (2) the teachers as a group, and particularly those who also perform as alternate site directors, are supervisors as defined in the Act; and (3) all of the Employer's teachers are professional employees as defined in the Act and thus must be excluded from the petitioned-for unit of otherwise non-professional employees.

The Petitioner contends that a multifacility unit is an appropriate unit for purposes of collective bargaining under the facts of this case. Moreover, the Petitioner contends that the teachers, even those who also perform as alternate site directors, are neither supervisors nor professional employees as defined in the Act.

II. Decision

For the reasons discussed in detail below, I find that the petitioned-for multifacility unit is an appropriate unit for the purposes of collective bargaining herein. Further, I find that the teachers as a group as well as those who also function as alternate site directors are not supervisors as defined in the Act. Finally, I find that the teachers are not professional employees as defined in the Act, but rather are non-professional employees to be included with the remaining unit classifications.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time and regular part-time Head Start and Child Care employee classifications, including: teacher; teacher assistant; teacher aide; teacher floater; cook; food aide; social service worker; social service aide; clerk/typist; group worker; and maintenance/custodian employed by the Employer at its facilities currently located at 7222 South Exchange (Ersula Howard Center), 4301 South Wabash (Maggie Drummond Center), 11410 South Edbrooke (Roseland Center), 3801 South Wabash (St. Thomas Day Care Center), 10530 South Oglesby (Trumbull Park Center), and 7939 South Western (Wright Renaissance Center) in Chicago, Illinois; but excluding directors, site directors, managers, confidential employees, office clerical employees and guards, and professional employees and supervisors as defined in the Act.

III. A Multi-Facility Unit is Appropriate

In the instant case, the Petitioner asserts that the employees of all six of the Employer's therapeutic educational facilities comprise an appropriate unit. The Employer contends that it is inappropriate to direct an election in the petitioned-for multi-location unit. The record does not support the Employer's contention.

A. Legal Principles/Case Law

Under Section 9(b) of the Act, the Board has broad discretion to determine “the unit appropriate for the purposes of collective bargaining” in each case “in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act.” *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494-497 (1985). The Board’s discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting; it need not choose the most appropriate unit. *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991); *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988).

In determining whether a petitioned-for multi-location unit is appropriate for collective bargaining, the Board examines traditional community-of-interest factors, including similarity in employee skills, duties, and working conditions; centralized control of management and supervision; functional integration; geographic separation of facilities; collective-bargaining history; and extent of union organization and employee choice. *Laboratory Corporation of America Holdings*, 341 NLRB No. 140, slip op. at 3-4 (May 28, 2004); *Bashas’, Inc.*, 337 NLRB 710 (2002); *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *Macy’s West, Inc.*, 327 NLRB 1222 (1999).

B. The Employer’s six facilities

The Employer is an Illinois 501(c)(3) non-profit corporation² engaged in providing a variety of social services throughout the south side of Chicago, Illinois, including the federally funded Head Start programs. At the six sites at issue, the Employer provides child care services, including infant and toddler day care, Head Start programs, and after-school care. These six sites constitute the Employer’s Therapeutic Education Division.³

A 32-member Board of Directors is responsible for the overall operations of the Employer. Executive Director George Jones, who is in charge of the Employer’s day-to-day operations, reports directly to the Board of Directors. Each of the Employer’s six divisions is headed by a Division Director, and several Area Directors report to the Division Directors. Finally, each site is operated on a day-to-day basis by a Site Director.

Five of the Employer’s six facilities at issue operate Monday through Friday from 7:00 a.m. to 6:00 p.m. The sixth facility, the St. Thomas Day Care Center, operates Monday through Friday from 6:30 a.m. to 6:00 p.m. Five of the six facilities provide care for children in the three-to-five year old age group.⁴ The sixth facility, the Wright Renaissance Day Care Center, provides care for infants and toddlers. Approximately 15 miles separates the two farthest facilities. The evidence shows that each of the six facilities range from 5 to 15 miles apart. Gregory Terry is the Area Director responsible for all six facilities at issue.

The number of petitioned-for employees employed at each of the six facilities at issue are as follows: 14 at Ersula Howard (9 are in the classifications of teacher, teacher assistant, teacher

² Section 501(c)(3) of the Internal Revenue Code defines nonprofit, charitable organizations.

³ The Employer maintains six divisions: Therapeutic Education; Adult Services; Foster Care; Intervention Services; Residential; and Education. The six locations at issue in the instant case are those in the Therapeutic Education program.

⁴ The St. Thomas facility also cares for two-year olds.

aide, or teacher floater); 10 at Maggie Drummond (6 are in the various teacher classifications); 12 at Roseland (7 are in the various teacher classifications); 8 at St. Thomas (5 are in the various teacher classifications); 10 at Trumble Park (6 are in the various teacher classifications); and 35 at Wright Renaissance (25 are in the various teacher classifications).

Not all of the petitioned-for classifications are employed at each facility. Five of the six facilities have one cook and one maintenance/custodian employee. Wright Renaissance has two cooks and two maintenance/custodian employees. There are two social service workers and/or aides at Wright Renaissance and one each at Ersula Howard and Trumbull Park. There are two clerk/typist employees who service all six facilities.

At each facility, all petitioned-for employees report to a Site Director. The Site Director runs the daily operations of the facility and ensures that it is operating in accordance with all applicable licensing and performance standards. Site Directors interview applicants and make hiring recommendations to the Area Director. In addition, Site Directors have the authority to and in fact issue discipline to the petitioned-for employees, upon review and approval by Area Director Terry. The Site Directors assign work to the petitioned-for employees at the facilities, adjust grievances, authorize overtime, and prepare annual performance reviews of all petitioned-for employees at their facilities. Maintenance/custodial employee Anthony Love testified that the Site Director at Maggie Drummond is responsible for that entire day care center and that she supervises the staff, assigns the work, and issues discipline.⁵

The record evidence shows that each facility functions fairly independently within the overall structure of the Employer's Therapeutic Education Division. Petitioned-for employees do not regularly transfer from facility to facility. Five to seven employees were permanently transferred within the past year, but the evidence shows that this resulted from the closing of one of the Employer's facilities. Maintenance/custodial employee Love⁶ testified that while he has been assigned to assist maintenance employees at the other facilities, he could only recall at most five such occasions in the past year. Likewise, the evidence shows that temporary transfers are sporadic in nature and used when teachers are on vacation or a facility is critically short-staffed.⁷ The only employees who regularly move from facility to facility are the teacher floaters, who, as the name implies, regularly fill in for absent or vacationing teachers. Area Director Terry testified that all employees who temporarily transfer from one facility to another report to the Site Director where they will be performing the work rather than to their own Site Director.

The record evidence shows that the Employer maintains a centralized hiring committee and human resources system for all six facilities. The Employer utilizes a hiring committee (comprised of employees from all six facilities) to interview and fill petitioned-for

⁵ I note for the record that the Petitioner has not disputed the supervisory status of the Site Directors, and has specifically excluded Site Directors from the instant petition.

⁶ The evidence shows that Love himself was permanently transferred from Wright Renaissance to Maggie Drummond about 4 months ago. Love testified that he was asked to transfer by the Site Director of Wright Renaissance.

⁷ Illinois state licensing standards require that each facility maintain a specific ratio of teachers to children (depending on the age group of the children). The record shows that the Employer will occasionally transfer a teacher or teachers' assistant or aide from one facility to another for a few hours or a few days in order to comply with the state requirements.

positions at all six sites. The Employer maintains employee personnel records at its central office, and provides the same employee handbook to all petitioned-for employees. All petitioned-for employees at the six locations receive the same benefits and are compensated on the same pay scale (hourly pay depends on classification rather than site location). The employees work in staggered eight-hour shifts, ranging from 6:30 a.m. to 6:00 p.m. The Employer holds staff training once or twice per year for employees from all six locations. The location rotates from one site to another year after year. In addition, the Employer holds monthly meetings for all teacher classifications from all six locations. Again, the location rotates from one facility to the next. The Site Director at the location where these meetings take place runs the meeting. Open positions for all employee classifications are posted at all six facilities.

C. Analysis

In considering the traditional community-of-interest factors delineated above, the majority of the evidence militates toward a finding that the petitioned-for unit is appropriate. The employee's skills, duties and working conditions at all six of the Employer's locations are similar. The teachers, teacher assistants and teacher aides perform the same functions at each facility and are required to possess the same respective levels of education. Similarly, the cooks and maintenance employees at each of the six facilities perform the same respective tasks. Custodian Love testified that he does exactly the same tasks at Maggie Drummond that he performed at Wright Renaissance. Each facility contains a kitchen, offices, and several classrooms. All employees at the six facilities in question receive the same benefits and pay scale commensurate with their positions.

The Employer maintains centralized control of management and, to some extent, supervision. In addition, the six sites are functionally integrated. Each site has a Site Director that can and does make certain autonomous decisions. However, the evidence shows that all six Site Directors report directly to the same Area Director, Gregory Terry, who visits each of the six locations at least once per week. Terry testified that he is directly involved with all hiring at the six locations, as is his supervisor, Executive Director George Jones. Moreover, Terry testified that he must approve all written discipline prepared by any Site Director at the six facilities. As federally funded Head Start locations, all six facilities are subject to the same licensing requirements and utilize the same curriculum.

Finally, there is sufficient interchange between employees at the various facilities to create a community of interests among all the employees. All six sites at issue are on the South Side of Chicago, separated by as little as 5 miles and at most 15. The teachers, teacher assistants and teacher aides travel from site to site on a monthly basis for mandatory meetings, and the entire staff at all six locations gathers once or twice per year. The teacher floaters are assigned to any one of the six locations depending on need. Though there have not been a large number of permanent transfers among the six facilities, the evidence shows that there have been permanent transfers (in addition to custodian Love) effectuated by the Employer in several of the petitioned-for classifications. And temporary transfers, while not common, have been imposed on petitioned-for unit employees. Though the Employer places great emphasis on the

maximum 15 mile distance between the two farthest sites, where other important factors militate against a single-location unit, the Board does not give geography controlling significance. *Orkin Exterminating Co.*, 258 NLRB 773 (1981).

Under all of the circumstances, I find that the petitioned-for multi-location unit comprised of the six Therapeutic Education facilities is an appropriate scope for the unit. Having found the scope of the unit appropriate, I now turn to the composition of the unit.

IV. Teachers as Supervisors and Alternate Site Directors as Supervisors

The Employer contends that all 58 teachers as a group are supervisors as defined in the Act. In addition and/or alternatively, the Employer asserts that those 9 teachers who act as Alternate Site Directors are supervisors as defined in the Act. Thus, the Employer argues that all teachers must be statutorily excluded from the petitioned-for unit. The Petitioner contends that none of the teachers, even those who are also Alternate Site Directors, qualify as supervisors as defined in the Act. Thus, the Petitioner asserts that all 58 teachers must be included in the petitioned-for unit.

For the reasons described below, I agree with the Petitioner that none of the teachers are supervisors as defined in the Act and that all 58 teachers must be included in the petitioned-for unit.

A. Legal Principles/Case Law

Section 2(11) of the Act defines a supervisor as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The exercise of any one of these authorities is sufficient to confer supervisory status; such authority, however, must be exercised “with independent judgment on behalf of management and not in a routine or sporadic manner;” *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990). The burden of demonstrating supervisory status is on the party seeking to exclude the individual as a supervisor. *Alois Box Co.*, 326 NLRB 1177 (1998); *Bennett Industries*, 313 NLRB 1363 (1994). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. See, e.g., *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992); and *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

B. The Teachers’ Duties and Qualifications

The Employer employs four teacher classifications: teacher; teacher assistant, teacher aide and teacher floater. The record evidence shows that teachers are required to possess: (1) an associate’s degree in early childhood education or in a related field with a minimum of 18 credit hours in early childhood education; or (2) a bachelor’s degree with six credit hours of early

childhood education.⁸ Teacher assistants must possess: (1) an associate's degree in early childhood education or in a related field with a minimum of six credit hours in early childhood education; (2) a child development certification "CDA"; or (3) 12 hours of early childhood education. A teacher aide must possess a high school diploma or its equivalent and a minimum of six hours of early childhood development coursework. Teacher floaters must possess the same requirements as the teachers. Teachers receive a higher wage than do the teacher assistants and teacher aides, but all three groups receive the same benefits. Teachers do not receive overtime pay; teacher assistants and teacher aides do receive overtime pay. When teacher assistants fill-in for teachers, they are paid as teacher assistants.

One of the main duties of the teacher classifications is to ensure that the classroom schedule is followed. Roseland Site Director Ann Luna testified that much of the classroom schedules are predetermined, such as mealtimes, naps, toileting and tooth brushing. Luna testified that although these events must be completed each day, the teacher classifications may alter the timing of the schedule to accommodate the children's needs. For example, teacher Lyris Clark testified that she and her assistant may decide to change the naptime in their classroom if the children are not particularly tired at the usual nap hour.

Another main function of the teacher classifications is to create and implement the classroom lesson plans. The balance of record evidence shows that the teachers, along with their assistants and/or aides, develop the lesson plans. The lesson plans are created within the parameters of a nationwide curriculum. The Employer uses two nationwide curricula at its facilities: Ages and Stages Developmental Monitoring for infants and toddlers at the Wright Renaissance facility and Creative Curriculum for the three-to-five year olds at the remaining five facilities. These curricula serve as guides for the teacher classifications regarding what and how to instruct and evaluate the children. Teacher Lyris Clark testified that the schedule she follows in her classroom is routine, and that only individual activities vary depending on the interests of the children. Clark testified that she, her assistant and her aide decide such things as which song to sing during song time, and which story to read during story time.

The final core function of the teacher classifications is to assess the children's behavioral, physical and intellectual development. The evidence shows that the teachers, assistants and aides make daily observations of the children and record anecdotal summaries of the children's activities in their individual records. In addition, the record shows that the teachers, assistants and aides use educational diagnostic tools to measure the development of the children. For the three-to-five year old group, the Early Screening Inventory ("ESI") is used. The ESI is a series of tests given to the children in the classroom and used to measure visual, language, cognitive and other skills. Redd testified that she and her assistant administer these tests together. For the infants and toddlers, the Ages and Stages test is actually administered by the parents and merely scored by the teacher or teacher assistant. According to teacher VeNessa Redd, it is not her education or her position of teacher that enables her to perform her job. Rather, Redd testified that it is the experience of knowing how to work with the children that makes her successful.

⁸ These are the requirements for the Employer's Teacher I position. Almost all of the Employer's teachers fall into the category of Teacher I. Area Director Terry was unsure of the number, but testified that there were between zero and five teachers employed by the Employer who fall into the category of Teacher II, which requires post-bachelor's credits or a post-bachelor's degree.

Similarly, Clark testified that there is no special knowledge necessary for her position as teacher. Rather, Clark stated that it is her understanding of children and their development and a good dose of common sense which enables her to do her job.

The evidence shows that teachers, along with regular and substantial input from their assistants and aides, usually prepare the lesson plans. However, the evidence also shows that teacher assistants can and do write lesson plans, which are reviewed by their teachers. Teacher Barbara Williams testified that her teacher assistant has “a lot of input” into her weekly lesson plans, and that “we sit down and do them together.” Similarly, teacher Clark testified that she, her teacher assistant and teacher aide determine the lessons for their children together. Clark testified that she actually asks her assistant if she is doing things properly with the children, since her assistant has more years of classroom experience. Teacher Redd testified that her teacher assistant makes suggestions to the weekly lesson plans, and that they work together in the classroom. Site Director Luna testified that the Site Directors or the Employer’s Educational Director review all teachers’ lesson plans once a week and that the teachers make corrections based on these reviews.

The balance of record evidence shows that the teachers work collaboratively with their assistants and aides in the classroom. Area Director Terry and Site Director Luna testified that the teachers regularly divide the workload and assign work to their assistants and aides. However, teachers Redd, Williams and Clark all testified that they do not assign or direct the work of their assistants and/or aides. Rather, each of the teachers (including the one presented as a witness for the Employer) testified that they work with and make decisions with their assistants and aides. Clark explained that her assistant or her aide on any given day may decide what song to sing to the children or what book to read and that she does not overrule them. Clark further testified that her assistant and her aide have made changes to her lesson plans without her approval due to the needs of the children. Clark stated that she gives discretion to her assistant and her aide on a daily basis. Clark further testified that although she is perceived as the “go to person” in the classroom by virtue of her position as teacher, it is a team effort among herself, her assistant, and her aide on a daily basis.

Clark and Redd testified that they have never disciplined their assistants or aides. Williams testified that she complained about her assistant once approximately five years ago, and that the Site Director issued discipline to the assistant after conducting her own investigation. Regarding evaluations, Williams testified that she has given oral input to her Site Director about her teacher assistant regarding such matters as whether the assistant’s paperwork was timely. Redd, however, testified that she has never been asked to give any input toward the evaluations of her assistant. Luna acknowledged that while some teachers may give input for their assistants’ and aides’ evaluations, they do not sign off on the evaluations.

C. Teachers as Alternate Site Directors

When the six Site Directors are off-site for meetings, absent or on vacation, state licensing standards require that someone operate the facilities. Therefore, the Employer uses teachers as Alternate Site Directors. Under state licensing regulations, legal responsibility for the facilities fall to these Alternate Site Directors in the absence of the Site Directors. If and when state or other children’s service agencies come to the Employer’s facilities for inspections,

the Alternate Site Directors, in the Site Directors' absence, provide requested documentation and access to the children's files.

The evidence shows that some Alternate Site Directors have more responsibilities than others at the Employer's facilities. Teacher Williams is an Alternate Site Director at Roseland. Williams testified that she acts as Alternate Site Director for a short period every morning, before her Site Director arrives for the day.⁹ Williams does not have an office as an Alternate Site Director, but she has access to the Site Director's office, which is left unlocked. Last year, a children's services agency came to Roseland when Luna was on vacation. Williams, as Alternate Site Director, had to provide records from Luna's office to the children's agency for an audit.

Williams, who testified that she spends between 15-20% of her time as an Alternate Site Director, testified that she does not and cannot make changes to the Employer's programs as an Alternate Site Director. Rather, she testified that her role was to answer parents' questions and provide information about the Employer's programs. If any major issues arise, Williams testified that she goes up the Employer's chain of command, calling the Area Director. Williams acts as an Alternate Site Director and a teacher simultaneously. If she has to call a meeting of the staff (due to a shortage of teaching staff or in case of an emergency), Williams testified that she holds the meetings in the hall just outside the classrooms. These meetings last only 5-10 minutes. Williams testified that Site Director Luna is on-site for all important scheduled activities, and that she is only called upon in emergencies.

Williams testified that she does not issue disciplinary write-ups as Alternate Site Director. Rather, Williams testified that if an employee refuses her request for coverage, all she can do is give an oral warning and then report it to Luna upon her return to the facility. Williams also testified that she has never recommended firing any employees and she did not know if she even had that authority. Williams further testified that she does not have the authority to approve or disapprove sick leave or other time off for employees. Williams does not attend supervisory meetings or receive any special privileges for acting as Alternate Site Director. She is paid as a teacher even when she acts as Alternate Site Director and does not receive feedback or commentary on her evaluations regarding her Alternate Site Director duties. Williams received no training to be an Alternate Site Director. Williams testified that, despite licensing guidelines, she is not required to stay until all other employees and children are gone, even in Luna's absence. Williams testified that there are times when both she and Luna leave before all of the teachers. In those cases, Williams testified that a teacher will handle whatever situation may arise.

Teacher Clark is also an Alternate Site Director (at Wright Renaissance). Clark acts as the Alternate Site Director for two to three hours each morning before her Site Director arrives, during which time either a cook or her teacher aide cover her classroom. Clark testified that she and the evening Alternate Site Director at Wright Renaissance do not have access to the Site Director's office, which is kept locked. Clark testified that her job as Alternate Site Director consists of answering the phone at the secretary's desk and taking messages for the Site Director.

⁹ Williams testified that she works from 8:00 a.m. to 4:00 p.m. and that Site Director Luna works from 8:30 or 9:00 a.m. to 5:00 p.m.

If and when children's agencies visit the site, or even to accept deliveries, Clark must call Area Director Terry each time. Clark testified that she has no access to any of the children's files or to the employees' personnel files.

As Alternate Site Director, Clark is not authorized to grant time off, issue discipline, hire, fire, or transfer employees, or evaluate their work. She testified that she can make only minor decisions on her own, such as permitting a teacher to take lunch early. Otherwise, she must call Area Director Terry. Clark testified that she resolves only common sense problems in the Site Director's absence, but nothing which involves a child or any of the Employer's programs. Clark further testified that the employees do not "report" to her as Alternate Site Director -- she is merely the "go to" person in the Site Director's absence. As is the case with Williams, Clark receives no training or additional pay for her position as Alternate Site Director. She does not attend the Site Directors' supervisory meetings.

D. Analysis of Teachers as Supervisors

In the instant case, the record evidence does not support a conclusion that the teachers as a group are supervisors as defined in the Act. To the contrary, all of the teachers who testified, including the Employer's witness, stated that they do not assign or direct the work of the teacher assistants or teacher aides. Rather, as described in detail above in Section IV(B), the teachers work alongside their assistants and aides to create and implement class schedules and lesson plans. Each of the teachers who testified asserted that she created lesson plans in conjunction with her assistant and/or aide. The teachers testified repeatedly that they worked with the assistants and aides as a team. Thus, the Employer's reliance on *Kentucky River*, 532 U.S. 706 (2001) (use of professional judgment, technical skill and experience in direction of work may form a proper basis for finding supervisory status), is misplaced because the record fails to substantiate that the teachers direct the teacher assistants and teacher aides.

Moreover, the record failed to show that the teachers made effective recommendations regarding discipline or evaluations of the assistants or aides. The Employer offered no documentary or testimonial evidence showing that a teacher had recommended discipline or had actually issued discipline to an assistant or aide. Only one teacher testified that her opinion was ever sought from the Site Director and Area Director concerning the evaluation of her assistant, and that input was limited to an oral reporting on the assistant's timeliness on her paperwork. The other teachers testified that their input for assistant and/or aide evaluations was not sought.

E. Analysis of Alternate Site Directors as Supervisors

The record evidence does not show that the teachers who act as Alternate Site Directors are supervisors as defined in the Act. Although on paper, the Alternate Site Director may have "overall responsibility" for the site in the absence of the Site Director, the record shows that, in practice, these teachers do little more than call 5-10 minute meetings in cases of emergency and retrieve paperwork for state agencies who pay unexpected visits to the Employer's facilities when the Site Directors are absent. The record clearly shows that the Alternate Site Directors have none of the Site Director's authority to hire, fire, transfer or evaluate other employees. Both Alternate Site Directors who testified stated that they had no authority to grant overtime or vacation or to issue written discipline to employees. One testified that she does nothing more than answer the phone and take messages for the Site Director, who keeps her office locked.

Both Alternate Site Directors testified that they would need to contact the Area Director if any issues arose regarding the children or the Employer's programs. Regardless of how much time these teachers act as Alternate Site Directors, their time is not spent engaged in supervisory activities. Thus, the Employer's cases concerning a "regular and substantial portion of their working time" have no impact on the facts at bar. The Alternate Site Directors simply do not possess any of the supervisory indicia as defined in the Act.

Having found that none of the teachers, including those who act as Alternate Site Directors, are supervisors as defined in the Act, I turn to the final issue of whether the teachers as a group are professional employees as defined in the Act.

V. Teachers as Professionals or Non-Professionals

A. Legal Principles/Case Law

Section 2(12) of the Act defines the term professional employee as any employee engaged in work that: (a) is predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (b) involves the consistent exercise of discretion and judgment in its performance; (c) is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (d) requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

Section 9(b)(1) of the Act provides that professional employees may not be included in a unit with non-professional employees unless the professional employees vote in favor of such inclusion. See *Sonotone Corp.*, 90 NLRB 1236, 1241-1242 (1950).

The Board has ruled on several cases involving the issue of teachers as professionals or non-professionals. In the cases cited by the Employer where the Board has held that teachers are professionals, such as *The Chase House, Inc.*, 235 NLRB 792 (1978) and *Catholic Bishop of Chicago*, 235 NLRB 776 (1978), the teachers in question had a minimum of a bachelor's or equivalent degree in early childhood education. Moreover, in *Catholic Bishop*, supra at 780, the parties stipulated that the teachers met all other parts of the definition of professional employees under the Act. In *Chase House*, supra at 793-794, the Board noted that the teachers researched and created new curriculum methods and that they trained and instructed subordinate staff.

B. Analysis

Based on the facts delineated in Sections IV(B) and IV(C) above and the applicable case law, I do not find that the teachers meet the criteria outlined for professional employees in Section 2(12) of the Act. Rather, I find on balance that the teachers are non-professional employees and thus must be included with the remaining classifications of petitioned-for employees. The Employer's teachers are not required to have a bachelor's degree in early childhood education. The Employer's teachers can hold a bachelor's degree in any field and have as few as 6 credits (two classes) in early childhood education. This level of education is more analogous to that of the teacher

assistants in *Chase House*, where an associate's degree in early childhood education/development or 2 years of college with 30 credit hours of early childhood education/teaching was required. These educational requirements, which are as advanced or even more so than the teacher requirements in the instant case, were held to be "minimal academic requirements," not of the advanced type acquired by a prolonged course of specialized intellectual study in an institution of higher learning. *Id.*

Moreover, it is undisputed that the Employer's teachers do not research or create the curriculum for the students, as they did in *Chase House*. In addition, I have previously found that the teachers in this case do not instruct or direct other members of the staff. The Employer's teachers themselves testified that their work was "routine" and that they follow the same schedule each day in the classroom, deviating only in such matters as the type of song to sing during song time. Even in their creation of lesson plans, the teachers testified that they use their innate knowledge of children rather than their education. In addition, the teachers work on their lesson plans as a part of a team with their assistants and aides, some of whom have only high school educations. Based on all of the record evidence, I do not find that this is the type of discretion and use of judgment contemplated under Section 2(12) of the Act. Therefore, I find that the teachers are non-professional employees and that they are to be included in the petitioned-for unit.

Accordingly, I direct an election in the unit of approximately 89 employees found appropriate herein.

VI. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Service Employees International Union (SEIU), Local 73.

VII. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois, 60606 on or before **September 17, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **September 24, 2004**.

DATED at Chicago, Illinois this 10th day of September, 2004.

/s/ Roberto G. Chavarry

Roberto G. Chavarry
Regional Director
National Labor Relations Board
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

CATS — Unit – Multi-Facility; Voter Eligibility – Statutory Exclusions (Supervisors); Voter Eligibility - Professionals

440-1720; 440-3300; 460-7550-8700; 177-9325; 372-6766-3500

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